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FOR ARGUMENT

In the

Supreme Court Of The United States

OCTOBER TERM, 1977

No. 76-1650

ALBERT OHRALIK,

Appellant,

v.

OHIO STATE BAR ASSOCIATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF FOR APPELLEE

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QUESTION PRESENTED

Whether DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility are violative of the Free Speech Clause of the First Amendment of the Constitution of the United States when applied to discipline a lawyer for in-person solicitation of his legal services to persons injured in the same automobile accident who were, if anything, casual acquaintances.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, United States Constitution:

Congress shall make no law . . . abridging the freedom of speech . . .

DR 2-103(A), Ohio Code of Professional Responsibility:[1]

A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

DR 2-104(A), Ohio Code of Professional Responsibility:

A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that: [Exceptions not applicable here.]

STATEMENT OF THE CASE

A. Preliminary Considerations

Appellant concedes that the facts found by the Ohio Supreme Court "fairly track the course of relevant events." (Brief of Appellant p. 6). Appellee agrees.

However, appellee cannot agree with the "few preliminary words *** with respect to the taped conversations" of appellant and Wanda Lou Holbert and appellant and the parents of Carol McClintock.

Appellant states:

> "These conversations were recorded by appellant only after he had reason to believe from his hospital conversation with Carol McClintock that he would likely be retained to represent her. The ensuing conversation with her parents, who confirmed the employment of appellant to represent Carol (App. 108a, 112a) and with Wanda Lou Holbert, the guest passenger in Carol's car at the time of the accident were taped with the thought that it was time to begin collecting his evidentiary 'work papers' if Carol really 'wants me to go to work.' (App. 93a) And in interviewing clients and witnesses appellant frequently found that he could not 'take all the information down fast enough.' (App. 83a) Hence, on such occasions he was prone to record the informational sessions on tape, as he did here." (Appellant's Brief p. 6)

[1] The entire Ohio Code of Professional Responsibility appears as a preface in 23 Ohio St.2d. Certain amendments to DR 2-103 and DR 2-104, not here relevant, were made in 1976 and appear in 44 Ohio St.2d xxi. The Code is promulgated by the Supreme Court of Ohio.

Appellee, like appellant, does not suggest that this Court relitigate and resolve all issues of contested fact. Nonetheless the above "few preliminary words with respect to the taped conversations" do not comport with the facts of this case. The references to the Appendix, cited by the appellant, are to the Transcription of his tape recorded conversations with the parents of Carol McClintock. At the time he secretly tape recorded that conversation in the McClintock's home, his only purpose for being there was to deliver a message from Carol to her parents that Carol wished her parents to visit her in the hospital that night, February 13, 1974. In appellant's words "I would have no excuse to go otherwise." (App. 86a) And the reason appellant gave for tape recording that conversation was: "Well, I never knew what might develop when I was over there." (App. 87a)

Furthermore, it is not accurate to state that "No question was raised reflecting on the *** virtual completeness of the tapes." (Appellant's Brief p.7) Wanda Lou Holbert, the second solicited client did raise a question of the "completeness" of appellant's secret tape recording of their conversations. She stated that the tape recording did not contain all of their

conversations, that "Mr. Ohralik stepped inside the house and told me who he was and that he was representing Miss McClintock as her attorney, and that he had talked to her about the accident and that he would also like to talk to me about it and represent me as my attorney." (App. 21a)

The above conversation is not included on the tape recording or in the transcript of the tape furnished as evidence in this case by appellant. (App. 21a)

B. The Relevant Facts

Albert Ohralik, appellant, was admitted to the practice of law in Ohio in March 1948. He is 55 years old and resides in Montville, Geauga County, Ohio. His law office was in Cleveland.[2]

These proceedings were commenced in September 1975 when the appellee, Ohio State Bar Association filed a formal complaint against appellant, Albert Ohralik, with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio. The complaint alleged that appellant (Respondent below) was guilty of the following misconduct:

> "On or about February 13, 1974 Respondent learned that Carol McClintock and Wanda Lou Holbert, of Chardon, Ohio, had been injured in an automobile accident. He then contacted Albert and Helen McClintock, the parents of Carol McClintock. Upon being informed that Carol McClintock was in the hospital, Respondent went to see her and advised her as to her legal rights. She thereupon employed Respondent to represent her as to her claims arising out of the accident.
>
> "On or about February 13, 1974, Respondent also went to the home of Wanda Lou Holbert and interviewed her regarding the accident. During such interview, Respondent advised Wanda Lou Holbert that she had a good claim for recovery for her injuries as a result of the accident and offered his services as an attorney to represent her. She thereupon employed Respondent.
>
> "Relator says that Respondent has violated DR 2-103(A) and DR 2-104(A) of the Code of Professional Responsibility."

Most of the material events involved in this case occurred on February 13, 1974.

Early in the morning of that day, appellant telephoned the home of Carol McClintock and talked to Mrs. McClintock, mother of Carol. There is a wide divergence between the testimony of Mrs. McClintock and appellant as to the content of that telephone conversation. Mrs. McClintock testified that appellant offered his services as a lawyer, inquired about their insurance coverage and asked if he could visit Carol in the hospital. (App. 44a-45a) Appellant testified that he telephoned Mrs. McClintock to inquire about Carol's health and whether he might visit Carol in the hospital and that Mrs. McClintock asked him to stop at their home before he went to the hospital. Appellant did not say why he was to visit the McClintock's home before visiting Carol. (App. 51a)

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[2] Mr. Ohralik's law office was in Cleveland "until he retired from law practice to Geauga County. He has had occasional clients, and a rather small law practice in Geauga County, though there was a smart increase in the 1970's. Despite the overall small volume, he has been 4 times taken to task by the Geauga County Bar Association within the last one year and five months." (Affidavit Brief of Albert Ohralik, May 16, 1974, in response to grievance filed against him by Wanda Lou Holbert.) (Rel. Ex. 3 a-c; TR 8-9)

TR — refers to designated pages of transcript.

Two uncontroverted facts emerge from this testimony. One. Appellant initiated the contact by calling the home of Carol McClintock and talking to Carol's mother about Carol's automobile accident and her injuries. Two. Appellant's desire to visit Carol in the hospital.

Later that morning appellant proceeded to the hospital in Painesville, Ohio, where Carol McClintock was undergoing treatment for the injuries she sustained in the accident. She had suffered two fractured legs, face lacerations, contusions and other injuries, and was in traction and under medication at the time of appellant's visit. (App. 34a, 35a, 44a, 53a)

With respect to that first visit of appellant at the hospital, Carol testified that the date was February 15, 1974, but in fact it was February 13. She said:

> "He came into the hospital and told me that he was a lawyer and that he had talked to my mom and dad; and they called me and said that he had been to the house and he wanted to come up and talk to me; and he came up — well, he came up to the hospital and said that he was a lawyer and that he had heard at the Post Office that I had been in a car accident and that I would need a lawyer:
>
> "Q. Did he have any written documents with him?
>
> "A. He had some typing paper with a contract written up on it, you know, typed up on it.
>
> "Q. What did he do with that?
>
> "A. Well, he read it to me and told me that he was a lawyer and asked me if I would like to have him to take my case.
>
> "Q. What did you tell him?
>
> "A. That I wanted to talk to mom and dad first."

(App. 31a, 32a)

Carol also testified that this first meeting with appellant lasted a half hour to forty-five minutes. (App. 32a)

Appellant's testimony tends to confirm Carol's testimony as to the approximate length of the visit, but not the content of their conversation. Appellant testified: (App. 53a-54a)

> "Q. Will you relate what conversation you had with Carol McClintock on that particular date and time?
>
> "A. Oh, I told her it was certainly a mess how a drunk driver could cause her those problems.
>
> "Well, I think we first commented on the butterflies that she had decorated in her room, and then I commiserated with her on how she was trussed up with pulleys and how confining it was, and then she brought up in the conversation that some hospital administrator was urging a lawyer upon her, and I chuckled and I said 'Yes, this certainly is a case that would entice a lawyer. That would interest him a great deal.
>
> * * *
>
> "Q. How long did you spend with Carol McClintock on this particular visit?
>
> "A. Oh, I guess about maybe 40 minutes to an hour maybe.
>
> * * *
>
> "Q. Did you reach an agreement to represent Carol McClintock at that particular visit?
>
> "A. No.
>
> "Q. Did Carol McClintock and you enter into an agreement on that particular visit?
>
> "A. No. Not on that visit, no.

"Q. I'm talking about either written or oral.
"A. On the day?
"Q. On February 13th.
"A. Yes, I arrived at an agreement — oh, not directly with her. Her parents told me.
"Q. I asked you did you and Carol McClintock enter into an agreement on that particular date and time, either written or oral, to represent her?
"A. Well orally, I did through an agency of her parents.
"Q. Do you understand the question?
"A. Well, unless I am confining it to talking to her directly —
"Q. I am talking about a visit at 11:00 o'clock in the morning on February 13, 1974, did you enter into an agreement either written or oral to represent Carol McClintock?
"A. No.
"Q. When you concluded your visit with Carol McClintock, what did you do in connection regarding this matter?
"A. Well, she asked me to tell her parents to come up and visit her that night, so I went home and got my tape recorder and I went to the McClintock home.
"Q. On the same date?
"A. Yes.
"Q. At what time?
"A. I got there about 1:00 o'clock, I guess.
"Q. Who was present?
"A. Mr. McClintock and Mrs. McClintock.

* * *

"Q. Where did you have the tape recorder?
"A. Under my rain coat on the kitchen table."

However, it appears that appellant did more than talk to Carol about the butterflies decorating her room and commiserating with her about her injuries, he also took 8 pictures of Carol and all of her traction.

(App. 129a. Transcription of taped conversation of appellant and Wanda Lou Holbert, February 13, 1974.) (A.O. — Albert Ohralik, W.H. — Wanda Holbert)

"A.O. Yes, I talked to her this morning in the hospital, and I think your brother was there was it.
"W.H. My sister-in-law and —
"A.O. Oh that's right. I was going to take pictures there but I was waiting for them to leave. I didn't want them to see me. I was sitting around waiting for them to leave. I don't know if they noticed that. I had a camera in my pocket. When they left I took 8 pictures of Carol and all of the traction. Did they put you in traction?
"W.H. No. I was just in bed (chuckle)."

Leaving the hospital, appellant drove to the scene of the accident, photographed it, and then proceeded to his home to pick-up his tape recorder. From his home appellant proceeded directly to the McClintock home where he examined their automobile liability insurance policy, discussed the law applicable to passenger guests, and obtained the address of Wanda Lou Holbert, the passenger in the automobile driven by Carol McClintock. Appellant's conversations with the McClintocks in their home on this second visit was secretly tape recorded by appellant with the tape recorder hidden under his rain coat.

Why appellant photographed the scene of the accident is not clear. According to appellant, he had not been employed to represent Carol when he left the hospital.

Why appellant drove to his home to pick-up his tape recorder before proceeding to the McClintock home is equally unclear. The only message appellant was to

deliver to Carol's parents was a request that they visit her that night.

With respect to those matters, appellant testified: (App. 86a, 87a)

"Q. Mr. Ohralik, when did you take these pictures at the scene? You said you had been at the scene?
"A. Yes. On my way back from — let's see. On my way back from Carol.
"Q. At the hospital?
"A. Yes
"Q. Now you hadn't been engaged to represent her at that time?
"A. Yes, that's true.
"Q. You just came by and took some pictures because you were curious?
"A. I have a camera in my car. I have two of them right now, and I take lots of pictures, and this was more occasion than usual to take pictures. I take a lot of pictures even if not related to any litigation.
"Q. Now it's my understanding from your testimony that the reason you were going to go back to her folk's house, to Helen McClintock's house, was because Carol asked you to tell her folks to stop by and see her that night?
"A. Yes.
"Q. That's the reason? That was the only reason you were going to go back there?
"A. Yes, it was. I would have no *excuse* to go otherwise. (Emphasis supplied.)
"Q. So you stopped, however, on the way from the hospital and took some pictures of the scene, not having been engaged, but just because you were interested?
"A. Well, I thought it would be a good precaution.
"Q. And then you stopped by her house; is that right?
"A. Well, I went home first and got my recorder.
"Q. To pick up your recorder?

"A. Yes.
"Q. You wanted to have your recorder with you when you went to see her mother and dad?
"A. Yes you never know what might happen.
"Q. Yet your only purpose in going there was to tell them that their daughter wanted to see them?
"A. Yes, that's true.
"Q. So you tucked the recorder under your coat just to deliver your message?
"A. Well, I never knew what might develop when I was over there."

Following his conversations with the McClintocks, appellant went to the home of Wanda Lou Holbert, then 18 years of age. Appellant did not know Wanda Lou Holbert other than seeing her face. (App. 78a) Wanda Lou had suffered a fractured pelvis, cracked ribs, and a head injury in the accident and had returned home from the hospital that day, February 13, 1974. (App. 120a-121a)

Appellant testified that he went to the Holbert home to interview her as a witness to the cause of the accident and not for the purpose of soliciting her as a client. (App. 58a) Mrs. McClintock testified that appellant went to see Wanda because "He was going to get her as a client. He would take both of them." (App. 48a)

Appellant upon being admitted to the home of Wanda engaged her in conversation at the front door and in the living room, and later at the kitchen table. The conversation between appellant and Wanda at the kitchen table was tape recorded by appellant. (App. 118a) Wanda did not know that appellant was tape recording their conversation. (App. 13a, Tr. 20-25) But Wanda testified that appellant's tape recording did not contain all of their conversation; that the first

conversation with appellant was at the front door when she admitted him and at that time he asked to represent her as her attorney.

"Mr. Ohralik stepped inside the house and told me who he was and that he was representing Miss McClintock as her attorney and that he had talked to her about the accident and that he would also like to talk to me about it and represent me as my attorney." (App. 13a, 14a, 21a)

During the course of the taped conversation with Wanda, appellant informed Wanda of the uninsured motorist provision of the insurance carried by Carol McClintock's parents and again offered to represent Wanda in her claim. Wanda said O.K. (App. 120a)

The following day, February 14, 1974, appellant telephoned Wanda Lou Holbert for the purpose of firming the attorney-client relationship begun the preceeding day. The phone was answered by Wanda's mother, Marie Holbert, a widow with 11 children, who unceremoniously advised appellant that his services were not desired. With respect to that phone conversation Mrs. Holbert testified:

> "Q. Can you tell the panel how that phone conversation came about?
> "A. Well, he called on the phone. He wanted to talk to Wanda. I said, "Well Wanda is not feeling too good. She is lying on the couch."
>
> He said, "I would like to talk to her about being her lawyer." I said, "Well I am sorry. We're not suing anybody." I said, "We have our own lawyer and we will get in touch with him."
>
> And he said, "Well Wanda is eighteen years old. She's her own boss and I would like to talk to her." I said, "I'm sorry. We talked it over and we don't want to sue nobody, and we don't want you as a lawyer."

> "Q. What did he say?
> "A. He says, "Well Wanda is eighteen. She is her own boss and she can talk for herself."
> "Q. Was that the end of the conversation?
> "A. No, he says that, "did you know you could sue McClintocks," and I said, "I don't have any intention of suing anyone." He said, "I saw an insurance policy that McClintocks have, and you can sue them for more money than you got," and I said, "I don't want to sue nobody."
> "Q. Was that the end of the conversation?
> "A. No. He said, "Well, Wanda gets to feeling better I would like for her to call me back." I said, "All right."
> "Q. Did you hang up then?
> "A. Yes, I did.
> "Q. Have you had any conversation with him since that time?
> "A. No, sir, I have not." (App. 23a-24a)

Wanda did not return appellant's telephone call nor did she respond to appellant's written request of February 28, 1974, for authorization to obtain her medical reports and for her to sign a written contract of employment. (App. 17a)

On March 14, 1974, Wanda wrote to appellant:

> "Mr. Ohralik;
>
> I do not wish to sue anyone so would you please contact anyone that you informed and tell them you are not my attorney, that is, if you have told anyone.
>
> Thank you." (App. 17a — Answer of Albert Ohralik to complaint of Wanda Lou Holbert. Rel. Ex. 1-l; TR 8-9)

Ignoring the oral and written notices that his services were not desired, appellant insisted that he had a valid binding agreement with Wanda and would not withdraw the notice he had given to the insurer of the

McClintock automobile that he was representing Wanda in her claim for medical payments and lost wages and compensation for her injuries.

Thereafter, in April 1974, Wanda Lou Holbert filed a complaint with the Grievance Committee of the Geauga County Bar Association alleging that appellant had solicited her case, that he was not her attorney although his notice to the insurance company claimed he was her attorney; that the insurance company was willing to pay for her injuries, but was unwilling to pay her because of the claim of appellant.

Appellant's answer to the complaint of Wanda demanded that Wanda pay him $2,466.66, and he would "disavow further interest and claim in her matter." (App. 26a-27a)

Wanda did not comply with appellant's demand.

At the hearing before the Board of Commissioners on January 29, 1976, appellant testified that he would abandon his claim against Wanda.

> "Q. Now how is the situation now of Wanda Holbert?
> "A. Well, I think I will have to abandon that because I think that the rules say that if a contract has its origin in a controversy, that an ethical question can arise; so I am going to abandon that." (Tr. 256)

Yet, on February 2, 1976, four days after appellant testified that he would abandon his claim against Wanda, he filed suit against her in the Chardon Municipal Court, Geauga County, Ohio, for $2,466.66, claiming a contract of employment. Appellant dismissed that suit with prejudice on January 27, 1977. (See Footnote 1, page 24)

Appellant sued Carol McClintock on her signed

agreement for value of services rendered and ultimately accepted a settlement of $4,166.66. Carol paid her second attorney $900.00 for his services in connection with the settlement negotiations with Mr. Ohralik and negotiations with the insurance company to settle for her personal injury claim. (App. 38a-42a)

After hearing on November 24, 1975, and January 29, 1976, the Board of Commissioners on Grievances and Discipline found that appellant did, in fact, solicit the personal injury cases of Carol McClintock, and Wanda Lou Holbert, in violation of DR 2-103(A) and DR 2-104(A), Ohio Code of Professional Responsibility.

The Board found appellant's defense, that the solicitation of business by an attorney is protected by the First and Fourteenth Amendments to the United States Constitution, to be without merit and overruled appellant's motion to dismiss. The Board recommended that appellant be publicly reprimanded. (J.S. 15a) Appellant was notified of the above findings of fact and recommendations of the Board on May 19, 1976, and on the same date a Show Cause Order was issued by the Court below, affording appellant the opportunity to object to the findings of fact and recommendation of the Board. (See Record of Proceedings below.)

Although not objecting to the findings of fact of the Board, appellant renewed his motion to dismiss these proceedings on the ground that DR 2-103(A) and DR 2-104(A) are unconstitutional for the reason that they deprive appellant of free speech as guaranteed by the United States and Ohio Constitutions.

Appellant's motion to dismiss the proceedings was overruled by the Court below September 17, 1976. (Ibid)

On October 18, 1976, appellant, by his Counsel, Walter S. Haffner, Cleveland, informed the court by letter that he did not desire to orally argue appellant's case before the court below, but desired to proceed on the briefs already submitted. He further informed the court by the same letter that he did not desire to orally argue the Motion to Stay Proceedings. (Ibid)

Upon review of the record made before the Board of Commissioners on Grievances and Discipline the Ohio Supreme Court found ample uncontroverted evidence supportive of the findings of the Board of Commissioners on Grievances and Discipline that appellant, Albert Ohralik, violated DR 2-103(A) and DR 2-104(A), of the Ohio Code of Professional Responsibility, in soliciting and obtaining agreements from Carol McClintock and Wanda Lou Holbert to represent them in their respective claims for damages arising out of the accident of February 2, 1974.

It was the judgment of the Ohio Supreme Court that appellant, Albert Ohralik, be indefinitely suspended from the practice of law for those unethical violations of the Ohio Code of Professional Responsibility. (J.S. App. A 3a)

SUMMARY OF ARGUMENT

This case presents the issue of whether the application of DR 2-103(A) and DR 2-104(A) of the Ohio Code of Professional Responsibility to appellant's in-person solicitation of his legal services violates his right of free speech under the First Amendment of the United States Constitution.

It is appellee's position that the constitutional principles raised and applied in *Bates v. State Bar of Arizona*, 433 U.S. . . , 97 S.Ct. 2691, 45 L.W. 4895

are dispositive of that issue and that the judgment of the Ohio Supreme Court should be affirmed.

In *Bates*, this court recognized that "the interest of the States in regulating lawyers is especially great since lawyers are essential to the primary function of administering justice, and have historically been 'officers of the courts.' *Goldfarb v. Virginia State Bar* 421 U.S. at 792. More specifically controls over solicitation and advertising by attorneys have long been subject to State's oversight." 45 L.W. 4898.

The First Amendment overbreath doctrine does not apply to in-person solicitation of legal services of a lawyer. Therefore appellant must demonstrate that his specific conduct is protected.

In-person solicitation, particularly in the hospital room of a physically ill patient or immediately after a patient has been released from a hospital, breeds undue influence, overreaching, harassment, deception and misrepresentation and is conduct harmful to the client and such solicitation is not protected by the First Amendment. Such was the conduct of the appellant in this case. It was rightly condemned by the court below.

ARGUMENT

In *Bates v. State Bar of Arizona*, 433 U.S. . . . , 97 S.Ct 2691, 45 L.W. 4895, the Court considered the validity under the First Amendment of an Arizona disciplinary rule that regulated professional advertising by attorneys.

The issue before the Court was a narrow one. It was:

> Whether the State may prevent the publication in a newspaper of appellant's truthful advertise-

ment concerning the availability and terms of routine legal services.

The Court held:

> We rule simply that the flow of such information may not be restrained, and we therefore hold the present application of the disciplinary rule against appellants to be violative of the First Amendment.

In so ruling, however, the Court declined to apply the First Amendment overbreath doctrine to the challenged disciplinary rule, the Court stating:

> But the justification for the application of overbreath analysis applies weakly, if at all, in the ordinary commercial context. As was acknowledged in *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. at 771 n.24, there are 'common sense differences' between commercial speech and other varieties. See also id., at 775-781 (concurring opinion). Since advertising is linked to commercial well-being it seems unlikely that such speech is particularly susceptible to being crushed by overbroad regulation. See id. at 722-723 n. 24. Moreover, concerns for uncertainty in determining the scope of protection are reduced; the advertiser seeks to disseminate information about a product or service that he provides, and presumably he can determine more readily than others whether his speech is truthful and protected. Ibid. Since overbreath has been described by this Court as 'strong medicine' which 'has been employed sparingly and only as a last resort.' *Broadrick v. Oklahoma* 413 U.S. at 613, we decline to apply it to professional advertising, a context where it is not necessary to further its intended objective. Cf. *Bigelow v. Virginia*, 421 U.S. at 817-818. 45 L.W. 4895-4903.

Accordingly, the constitutionality of the Arizona disciplinary rule was considered from the standpoint

of the "traditional" First Amendment rule, that is, "that the person making the attack demonstrate that in fact his specific conduct was protected." He "may not challenge a statute on the ground that it might be applied unconstitutionally in circumstances other than those before the court." Ibid.

From the majority opinion in *Bates* we further deduce (1) that solicitation of professional employment is commercial speech; (2) that commercial speech is entitled to some First Amendment protection; (3) and that commercial speech which is false, misleading, deceptive, or otherwise evil is not entitled to First Amendment protection and may be restrained.

This case, then, does not present the constitutional issue of whether DR 2-103(A) or DR 2-104(A) are overbroad in First Amendment terms, but rather the narrow issue of whether the application of those rules to the conduct of appellant are violative of his First Amendment right of free speech.

The court below dismissed appellant's First Amendment claim, and, in effect, held that appellant's conduct was outside the scope of the First Amendment protection.

Although the court below did not make specific findings of fact of overreaching, misrepresentation, deception, conflict of interest or undue influence by appellant in his solicitation of the personal injury claims of the two young women in this case, the findings of fact by the court below and the record of this case show that elements of such conduct are present. It is the clear purpose of DR 2-103(A) and DR 2-104(A) to eliminate or at least reduce, to the greatest extent possible, the possibility that potential clients will be improperly influenced.

SOLICITATION OF PROFESSIONAL EMPLOYMENT THAT IS MARKED BY UNDUE INFLUENCE, OVERREACHING, DECEPTION, MISREPRESENTATION OR OTHER LIKE CONDUCT IS HARMFUL TO THE CLIENT AND NOT PROTECTED BY THE FIRST AMENDMENT.

The viewpoints of scholars on the subject of anti-solicitation rules of professional conduct such as those embodied in DR 2-103(A) and DR 2-104(A), here involved, are amply covered by the brief of appellant at pages 31-35. We do not intend to add to that list. However, as noted by appellant, the scholars and appellant agree that there are real evils that may result from in-person solicitation which the States are justified in restraining.

> One of the major charges against solicitation is that it may harm the client where the solicitation is marked by overreaching, overcharging or misrepresentation as to the legal services to be provided. And solicitation that is superimposed upon the physically or mentally ill patient or upon the accident victim unable to manage his legal affairs, obviously injures the best interests of such a client. Such injuries, where proved, serve to define specific types of solicitation that by any standard merit condemnation and professional sanctions. (Id. 32)

Since it is appellant's conduct that is here in question, we turn to an examination of that conduct as exemplified in the record.

Carol McClintock's Case

Carol McClintock and Wanda Lou Holbert were seriously injured in an automobile accident on February 2, 1974. Both were 18 years of age. Carol was

the driver and Wanda her passenger. The tortfeasor was uninsured. Carol's parents owned the automobile she was driving and carried uninsured motorist coverage.

Carol's personal injury claim was solicited by appellant in the hospital on February 13, 1974, eleven days after the accident. She had suffered two fractured legs and other injuries in the accident and was in traction at the time of appellant's visit. Carol did not employ appellant during that visit. However, she did employ him later that day by phoning her parents and telling them to tell appellant "to go to work on her case."

Appellant had proceeded from the hospital to the home of Carol's parents where he discussed with them their insurance coverage and the means Carol might employ to obtain compensation for her injuries. That discussion was secretly tape recorded by appellant by hiding his tape recorder under his coat. The transcript of that tape recording appears on page 92a of the Appendix.

Two days after his first visit, appellant returned to the hospital and obtained Carol's signature to a written contract employing appellant to represent her in her personal injury case. Carol was still in traction.

One month later, Carol was discharged from the hospital. She was in a body cast and needed a wheelchair to move about. (App. 33a)

Soon after her discharge from the hospital, Carol became dissatisfied with appellant's services, principally because she was unable to reach appellant by telephone to determine the status of her case, and discharged him. (App. 34a)

In the letter terminating appellant's services Carol stated that she was under the "influence of drugs"

when she agreed to employ him and was not sure she wanted him for her attorney. (App. 35a) In view of Carol's physical condition at the time she signed the contract of employment, this statement is probably the truth. It is not controverted in the record.

Whether or not Carol was "under the influence of drugs" when she employed appellant, her case points up the dangers of in-hospital solicitation to the patient-client who is unsophisticated in legal matters and vulnerable to the subtle persuasions of the sophisticated attorney. The dangers of undue influence in such a setting are real. An attorney who engages in in-hospital solicitation merits condemnation.

Furthermore, after his services were terminated, appellant sued Carol and the insurance company demanding one-third of any funds paid to Carol. That suit effectively prevented Carol from receiving any compensation from the insurance company. Carol settled that suit for $4,166.66, one-third of her compensation. (Tr. 141, App. 38a)

Wanda Lou Holbert's Case

Appellant solicited the case of Wanda Lou Holbert on February 13, 1974 in her home only a few hours after she had been released from the hospital.

The conversation between appellant and Wanda was secretly tape recorded by appellant by hiding his tape recorder under his raincoat. In the course of their conversation, appellant explained to Wanda that she had a compensable claim for her personal injuries, and offered to represent her. She said O.K. (App. 22a, 118a)

On the same day, after leaving Wanda, appellant wrote to the alleged tortfeasor that he represented her in her claim for compensatory damages.

The next morning, February 14, 1974, appellant phoned Wanda's home to confirm their relationship. This time, however, he talked to Wanda's mother who informed him in no uncertain terms that his services were not desired. (App. 23a-24a) Yet, with that knowledge, appellant on the same day wrote to the insurance adjuster for the insurer of Wanda's claim and told him that he represented Wanda; a clear misrepresentation of the fact. (See Answer of Albert Ohralik to Complaint of Wanda Lou Holbert. Rel. Ex. 1-g; TR 8-9)

Refusing to accept the notice that his services were not desired, appellant wrote to Wanda on February 28, 1974, requesting that she sign an enclosed contract of employment. She did not respond to that request. Two weeks later, on March 14, 1974, Wanda notified appellant by letter that he was not her attorney and requested that he so notify anyone he had otherwise informed. (App. 16a-17a) Appellant ignored her request, and let stand his previous notice to the insurance adjuster that he represented Wanda.

The insurer of the McClintock's automobile was willing to reimburse Wanda for her medical expenses, but withheld payment because of appellant's claim that he represented her. (App. 25a, 26a)

In April 1974, Wanda complained to the local bar association about appellant's conduct. But appellant continued to demand one-third of any compensation paid to Wanda for her injuries and threatened suit if he did not receive it. As proof of his claim of contract of employment with Wanda, appellant submitted to the bar association a copy of his secretly tape recorded conversation with Wanda on February 13, 1974. (Answer of Albert Ohralik to Complaint of Wanda Holbert — Rel. Ex. 1-a; TR 8-9) However, through the

intercessions of the local bar association grievance committee, appellant finally notified the insurer that he released his attorney claim only against funds that might be paid to Wanda under the medical pay coverage of the policy. (Answer of Albert Ohralik to Complaint of Wanda Lou Holbert, Rel. Ex. 1-n; TR 8-9)

In the hearing before the Board of Commissioners on Grievances and Discipline in the court below, appellant testified that he would abandon his claim against Wanda. (Tr. 256)

Although not a part of the record of the proceedings in the court below, nonetheless, it is a fact that four days after appellant made the above sworn statement that he would abandon his claim against Wanda, he filed suit against her demanding $2,466.66 under a contract of employment. That suit was dismissed with prejudice after notice of appeal to this Court was filed.[1]

In summary, this case is marked by undue influence in soliciting and obtaining an agreement from Carol McClintock to represent her in her claim when she was physically ill in the hospital. It is marked by deception and overreaching by appellant in soliciting and obtaining an agreement from Wanda Lou Holbert while secretly tape recording their conversation. The solicitation of Wanda is further marked by misrepresentation. Appellant knew on February 14, 1974 that his services were not desired by Wanda, yet on the same day he wrote the insurer's agent that he represented her. Appellant took no action to correct that

[1] The case is styled, Albert Ohralik v. Wanda Lou Holbert, et al, Case No. 76-CV-F66, Chardon Municipal Court, Geauga County, Ohio.

misrepresentation, but on the contrary continued to assert that he represented Wanda. His misrepresentation prevented Wanda from being reimbursed for her medical expenses at a time when she needed funds to pay her medical and hospital bills.

Is then appellant's conduct outside the scope of basic First Amendment protection? It is appellee's position that it is. The Court below properly exercised its responsibility to protect the public from such conduct.

CONCLUSION

The judgment of the Supreme Court of Ohio is correct and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Brief of Appellee have been mailed by first class mail with postage prepaid to Eugene Gressman, Counsel for Appellant, 1828 L. Street N.W., Washington, D.C. 20036.

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